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IN THE

Supreme Court of the United States

October Term, 1966

No. 1170

FLETCHER H. HANSON, ET AL, *Petitioner*,

vs.

THE CHESAPEAKE AND OHIO RAILWAY, COMPANY, a corporation, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation

IN OPPOSITION

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April 25, 1966

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OPINIONS BELOW

The citation for the opinion of the District Court has been presented in the petition. However, the Federal Reporter citation for the memorandum decisions of the Court of Appeals which was not given in the Petition is 351 F.2d 953 (1965). The opinion of the District Court is set out in the Appendix to the Petition in Section Three, while the judgment of the Court of Appeals is set out in such Appendix in Section Five.

JURISDICTION

The jurisdictional grounds are set forth in the Petition.

QUESTIONS PRESENTED

While petitioners are at liberty to delineate the questions in their petition as they see fit, the respondent Railway Company does not agree that the questions presented by the petitioners are at issue in this case. When fairly stated the questions are as follows:

1. Whether Award No. 9193 of the Third Division, National Railroad Adjustment Board is invalid, erroneous and unenforceable.

2. Whether the Railway Company would be denied due process of law under the Fifth Amendment to the United States Constitution if no review whatsoever was allowed as to the non-money award part of Award No. 9193 of the Third Division, National Railroad Adjustment Board.

3. Whether, even under a valid award, petitioners on the record of the case are barred from any money recovery herein because their claims have either been fully paid and satisfied or because they were not adversely affected by displacement as a result of the reduction of work forces at the Railway's Huntington, West Virginia freight station.

STATUTE INVOLVED

The pertinent statute is the Railway Labor Act, particularly Section 153 of Title 45 U.S.C.

STATEMENT OF THE CASE

This controversy grows out of action taken in early 1955 when in the interest of economy and efficiency the Railway Company exercised its managerial prerogative and, in the vernacular of railroading, changed its "car lines" for the handling of "package cars" of "LCL" freight. In the railroad industry

pieces of less-than-carload (LCL) freight moving to the same general geographic area are combined into carload lots (package cars) and moved over predetermined routes (car lines) according to regular schedules devised and revised as the amount of freight fluctuates to a centralized freight depot where the package cars are unloaded, sorted and the freight combined with the contents of other package cars from other areas into a car going to the city of ultimate destination. Such a freight depot where this reassembling process is carried out is called a "break-bulk" point. Since the beginning of railroading as LCL business has fluctuated and the needs of customers varied, the railroads have found it necessary to create new break-bulk points, abolish others, change car lines, and revise their schedules for breaking bulk on LCL shipments. Railroad management always made the decision as to which stations would "break" out package cars; unions have never made that managerial decision. Particularly since over-the-road trucking companies have eroded into railroads' LCL freight business, railroads have found it necessary to curtail operations in some break-bulk points and consolidate business elsewhere. LCL business has dwindled on the C&O to the point that pursuant to authorization of the Interstate Commerce Commission and the West Virginia Public Service Commission, the Railway Company now handles only carload lots in West Virginia and does no loading or unloading of any less-than-carload shipments. It follows that there are now no break-bulk operations either.

As a part of this constant adjustment of LCL car lines, the Chesapeake and Ohio Railway Company revised its package car schedule effective March 22, April 1, 4 and 18, 1955, at various points of origin (Petition, Appendix, Section One, p.23) which had the ultimate result of fewer package cars coming to Huntington, West Virginia, for break-bulk handling than had previously been the case with a consequential abol-

ishment of 23 job positions in Huntington. In March April and May, 1955, because of an increase in LCL break-bulk work at the freight depot in Ashland, Kentucky, 16 miles from Huntington, nine new positions were created in Ashland. The first new position came March 1, 1955, (Petition, Appendix, Section One, p.25) while the first schedule change came March 22, 1955. No position was abolished in Huntington until April 1, 1955.

By virtue of collective bargaining agreements, all freight-handling work done on the Railway Company's lines had for many years been handled exclusively by members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, commonly known as the "Clerks Union." Under those agreements various seniority districts were established, and it so happens that Huntington is in one seniority district while Ashland is in another. In 1955 the Railway Company and Clerks Union had in effect their agreement No. 7 dated January 1, 1945, which took the form of a printed booklet and is in the record as an exhibit to the affidavit filed in support of the Railway Company's Motion for Summary Judgment. After the 1955 change in schedule, all package cars which came to Huntington continued to be handled by Huntington seniority district Clerks Union personnel. No cars came to Huntington and then were transshipped to Ashland for handling, so that actually there was no transfer of work from the Huntington seniority district to the Ashland district.

Although prior collective bargaining agreements containing the same provisions, insofar as is pertinent here, had been in existence between the Railway Company and the Clerks Union for many years, and unilateral changes in the schedule and routes of LCL package cars had been made many times by the railroad with resultant changes in work forces and no

protests had ever been filed on the part of the Clerks Union, on this occasion that Union took the position that the 1955 change in car line schedule and concomitant diminution of work in Huntingon violated their collective bargaining Agreement. The Union filed a claim with the National Railroad Adjustment Board pursuant to the Railway Labor Act, 45 U.S.C.A. 151 *et seq.*, governing disputes involving the interpretation of an existing contract—a "minor dispute" in railroad parlance, as defined in *Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). After a deadlock among the 10 members of the Board's Third Division, a referee was brought into the case. By order of January 18, 1960, upon a 6-5 vote, it was held that the Railway Company's action violated Rules 1, 3 and 6 of the collective bargaining Agreement and the Board ordered that adversely affected employees should be compensated therefor.

While of the strong opinion that the Board's order was an invalid, erroneous, unenforceable extralimitary decision, as a means of seeking labor peace and in an attempt to avert litigation the Railway Company paid all employees who were conceivably adversely affected by the abolishing of the 23 positions in Huntington. The Railway Company took the work records of the 23 incumbents of the abolished positions and paid them for any lost time or pay differential between what they actually earned and what they would have earned at the rate called for on the position they held prior to its abolishment. Since those 23 men "bumped" or displaced persons with junior seniority holding other positions and those displaced persons in turn displaced other younger employees in a chain reaction, under this method of computation a total of 59 employees at Huntington were found to have incurred wage losses by reason of the 1955 change of car lines. The Railway Company paid those 59 persons a total of $59,104.95, after the manner of ascertain-

ing which employees were affected and the method of computation was discussed with the Clerks Union and the Union found it agreeable. Five of the petitioners herein shared in those payments but in this action claim additional sums. Of the remaining 11 petitioners here, the record shows one was dismissed from Railway service by reason of disciplinary action and not by reason of the cutback in forces, others were on "cut-off" status, having been previously laid off so that they were not working for the Railway Company in early 1955, while the remainder received as much money on other jobs as could have been earned had the 23 positions not been abolished, so that none of the dissident petitioners were adversely affected by the abolishment of the positions.

Upon the institution of this enforcement action by the 16 individual petitioners claiming to be beneficiaries of the NRAB award, the Railway Company moved to dismiss the action on the grounds that the Board's decision in this case, Award 9193, is so vague and indefinite that it is inadequate as a matter of law to vest jurisdiction in the courts. The trial court overruled that motion and wrote in explanation thereof an opinion reported in 198 F. Supp. 325. Thereafter the Railway Company filed its Motion for Summary Judgment supported by an affidavit explaining the undisputed facts of the case and attaching as an exhibit the Clerks Union Agreement. This motion for summary judgment (see Appendix this brief, p. 1) was based upon the following:

1. The award is invalid, erroneous and unenforceable.

2. The claims of five petitioners, Masterson, Bowman, Scragg, Maynard and Taylor were barred because fully satisfied and settled.

3. The eleven other petitioners were not adversely affected by displacement as a result of the

reduction of work forces at the Railway's Huntington, West Virginia freight station and, consequently, are not entitled to recovery.

The Railway Company accompanied its Motion for Summary Judgment with an affidavit of its Assistant Vice President-Labor Relations explaining the railroad industry's historic custom and practice of adjusting car lines to change break-bulk points on LCL package car shipments as traffic volume varied, and attached the complete record of the NRAB award, including copies of the exhibits introduced before the Board and a copy of the Agreement of January 1, 1945. The affidavit further explained the method of payment to the 59 affected employees who were paid by reason of the award and set forth the work record of the various petitioners showing that none of them were adversely affected by the abolishment of the 23 positions in Huntington. No factual issue was set up by the petitioners through any fact-containing counter-affidavit. The Motion for Summary Judgment with the pertinent portions of the affidavit appear in the Appendix of this brief at pp. 1, 2, the exhibits appear in the record on appeal in this case, being too voluminous to practicably be printed in the Appendix. Petitioners made no claim below that there are factual issues outstanding and can hardly controvert the facts in the affidavit now, for it has been held, "to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute. * * *" *Zoby v. American Fidelity Company*, 4 Cir., 242 F.2d 76, 80 (1957).

The District Court granted the Railway Company's motion for summary judgment holding in effect that the award was invalid, erroneous and unenforceable. The Court of Appeals affirmed in a per curiam opinion and ruled that "Upon consideration of the briefs, oral argument and *entire record*, we find no error." (Italics ours) 351 F.2d 953 (1965).

ARGUMENT

I. THE DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GUNTHER V. SAN DIEGO & ARIZONA EASTERN RAILWAY CO.* ..... U.S. ....., 86 S.CT. 368, 15 L.ED.2D 308 (1965) AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Contrary to the argument of the petitioners, the decision below does not conflict with the *Gunther* case. The circumstances of the case developed on the record here are not the same. *Gunther* involved an award of the National Railroad Adjustment Board, holding that a railway engineer was wrongfully removed from service and, because of such wrongful removal, should be reinstated with back pay. There it was determined that the basic grievance was the removal from service, while the reinstatement with pay aspect of the case was regarded as a money award. Accordingly, it was ruled that the District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit must accept the Adjustment Board's ruling on the merits of the wrongful removal issue with the money award being left to further proceedings before the District Court.

Although this Court seemed to say that a Board decision, other than as to the money award part, was to have the same finality that a decision of an arbitrator would have, it was not said nor held that a decision of the Board was to be regarded with more finality than an arbitrator's decision or with absolute finality. Actually, this Court, itself, exercised a right of review by carefully scrutinizing the Board's decision after which it commented at 86 S.Ct. 368, 371 that "* * * *Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason.* * * *" (Emphasis added). This language clearly indicates

that the non-money part of the award of the Board is not to be regarded as totally sacrosanct and further shows that the courts will be allowed to apply much the same test as that referred to by Judge Holtzoff in *In Re Certain Carriers; etc. Represented by Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific Railroad*, D.C.D.C., 248 F.Supp. 1008, 1013 D.C.D.C. (1966) in connection with Section 159 of the Railway Labor Act, that is, whether the Board "exceeded its power, committed error of law or acted arbitrarily or capriciously."

This is consistent with the national policy favoring private contractual arbitration recognized under Section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185 in the trilogy cases of *United Steel Workers of America v. Warrior & Gulf*, etc. 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343; 4 L.Ed.2d 1403 (1960); and *United Steel Workers of America v. Enterprise W. & C. Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960). For even in those cases this Court while favoring the expertise of the arbitrator and the law of the shop did not forclose judicial intervention. In *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the opinion of the Court said:

> "* * * Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In *Gunther* there was a factual determination to be made by the Board as to whether the engineer was physically fit and there were definite provisions in the contract calling for a hearing before suspension or discharge could take place. See *Gunther v. San Diego & Arizona Eastern Railway Co.*, D.C.S.D. Cal., 198 Fed.Supp. 402, 422 (1961). In this case now before the Court, the Board stated that the basic facts are undisputed and said that the agreement was so unambiguous that consideration of evidence regarding past practice favoring the action of the carrier was not appropriate. Petitioner's Brief, Appendix, Section One, p. 34. So, no factual determination as such was made and the so-called expertise of the Board in railroad matters and customs went unused when past practice was ignored by the majority of the Board who really made only a legal determination as to the meaning of admittedly unambiguous contract language. Yet, the majority pointed to no language in the contract supporting its view and was accused by the minority of not only failing to confine itself to the contract but of imposing its own will to re-write the contract agreed upon by the parties. Petition, Appendix, Section One, p. 36.

That the Board did re-write the contract is manifest. There is no dispute that the abolishing of positions in Huntington came as a result of the change of the car line schedule governing package car LCL freight in early 1955 mentioned above. No claim is made that in the mechanics of abolishing those jobs, and in handling the subsequent "bumping" by the incumbents of those petitions into other positions, that any violation of the Agreement occurred; on the contrary it was the contract which vouchsafed the right to exercise seniority and "bump" men with fewer years experience to do the remaining work in Huntington. There is no claim that any package cars came to Huntington and were then transshipped to Ashland in violation of the Agreement, but rather all package cars

which came to Huntington after the change in schedule were worked by Huntington seniority district employees. Thus the primary question is whether the Company-Union Agreement forbade the Railway Company's inaugurating the change of its car lines. The NRAB award cited no specific language of the Agreement which was said to have been violated. Likewise counsel for the petitioners could point to no sentence of the Agreement which was broken, and after a thorough study of the entire Agreement the District Court held that there had been no violation in the abolishment of the 23 positions wherefore petitioners could not, even if adversely affected, maintain an enforcement action thereon.

The majority opinion of the Third Division of the Board speciously reasoned that the Railway Company's unilateral change of car line schedules violated three sections of the Company-Union Agreement: "not even to consider the effect of the aforementioned changes with the Brotherhood constitutes a violation of Rules 1, 3 and 6 of the Agreement." (Petition, Appendix, Section One, p. 34). The District Court considered each of those three sections, quoting the contract language thereof (Petition, Appendix, Section Three, p. 7a-10a), in light of the undisputed evidence before it and could find no such violation.

Rule 1 of the Agreement (Petition, Appendix, Section One, p. 3) is entitled "Scope" and merely sets forth which employees are covered: "These rules shall govern the hours of service and working conditions of all the following class of employees:" going on to subdivide in what is called "Group 1—Clerical Workers" those who keep records, transcribe letters, render bills, operate typewriters, accounting machines, etc. while "Group 3" encompasses laborers employed around offices or stations, such as porters or janitors. Nothing in that Rule guarantees that there will be any work available to any persons in those classifications, but

the Rule only says that when there is work of that type it is to be performed only by persons covered by this Agreement.

Rule 3, (Petition, Appendix, Section One, p. 4) is entitled "Seniority" and recognizes that:

> "Seniority is established and its exercise allowed as provided by the terms of this Agreement. Seniority established hereunder is to be retained by the employe subject to the terms of this Agreement while the same remains in effect."

In other words, seniority is acknowledged to be purely a contractual matter—just as the courts have always held in dealing with railway labor questions: "Seniority among railway workers is fundamentally and wholly contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right." *Colbert v. Brotherhood of Railroad Trainmen*, 9 Cir., 206 F.2d 9, 13 (1953), certiorari denied 346 U.S. 931, 74 S.Ct. 320, 98 L.Ed. 422. Or as termed in *McMullans v. Kansas, Oklahoma and Gulf Railway Co.*, 10 Cir., 229 F.2d 50, 53 (1956), certiorari denied 351 U.S. 918, 76 S.Ct. 710, 100 L.Ed. 1450, "Seniority among railroad employees is contractual and does not arise from mere employment." Rule 3 goes on to set out in detail when and how an employee establishes seniority and how such seniority is to be considered in "bidding" for vacancies or "bulletined" positions. In essence this section or Rule does no more than say, as the lower court pointed out, "seniority essentially means that the oldest man in point of service is given the choice of jobs, is the first promoted, and the last laid off." (Petition, Appendix, Section Three, p. 12a).

Rule 6, entitled "Seniority Districts—Other than General Office," (Petition, Appendix, Section One,

p. 5) establishes the geographic limits of different seniority districts and in effect says that when there is an opening, preference will be given (after employees of the particular department involved) to employees of that district. Subsection (c) says: "Seniority districts shall not be changed except by mutual agreement * * *." Since Ashland and Huntington are in separate districts created by that Rule, when the volume of work at Huntington decreased, the Railway Company could not order the incumbents of the abolished positions to go to Ashland, for they would lose all their Agreement-protected seniority. There was no change of territorial boundaries of districts in contravention of Subsection (c); as the District Judge cogently commented in holding Rule 6 was not violated, nothing in the record has "shown that the schedule change complained of has expanded, lessened, or otherwise changed the seniority district." (Petition, Appendix, Section Three, p. 12a).

Taking these Rules separately or collectively, it can be seen that the District Court was irrefragably correct in holding that what transpired in early 1955 did not violate the Agreement. The Board's majority opinion tenuously rested on the principle that "seniority is a valuable property right." If it is understood that seniority is always a child of contract, and therefore necessarily limited and governed by the contract, we take no issue with that statement. So long as there is work to be done at a particular station, factory, mine, etc. it is a valuable right to have first chance to do that work because of seniority earned through the years pursuant to a collective bargaining agreement. But when there is no work to do at that point, seniority is of little value. For instance, there are thousands of unemployed coal miners in West Virginia who hold seniority with mining companies, but because of mechanization and depletion of the coal seam, there is no work for them, so their seniority is of no value. Similarly there were many persons hired by

the railroads of this country during the peak of wartime activities who hold some seniority but have no jobs because of post-war cutbacks and dieselization.

The NRAB Third Division's majority opinion let its concern with *seniority per se* becloud the fact that nothing in the Agreement of January 1, 1945, dealing with seniority or any other subject gave persons on the seniority roster at Huntington an exclusive right to continue doing the same break-bulk work for time immemorial. The Agreement spelled out in detail how apportionment would be made of such work as there was to be done in Huntington but that Agreement in no way obligated the Railway Company to provide jobs at Huntington forever by bringing break-bulk work into Huntington—yet that would be the effect of the majority's finding that the Agreement was breached.

In an effort to sidestep this effect and justify its erroneous and arbitrary decision, the majority opinion in Award 9193 said: "All we hold in this case is that before making changes * * * the Carrier must *consult* the appropriate bargaining representative of the employes affected in a bona fide effort to mitigate the impact of the changes upon those employes." (Emphasis added). In the first place, the Agreement nowhere requires management to "consult" the Union before making managerial decisions. Secondly, under that language, the majority is saying that if it had "consulted" with the Union, even though the Union refused to agree to the change of package car lines, the Railway Company could then make those changes with impunity in which event even the majority would admit there was no violation of this Agreement. Such reasoning cannot be sound, for either the Union has an Agreement-established right to veto the Railway Company's contemplated alteration of car lines, which we deny, or it had no such right. There is no place for a middle ground requiring futile "consultation."

The law will not require a futile act, and it would be obviously most futile to require consultation with the Union in a matter, after which the Company has the right to ignore the Union's position. This incongruity merely points up that the Union had no right to complain of the Railway Company's action and the majority opinion cannot withstand the light of judicial scrutiny.

The law is well settled that the approach to be taken in interpreting railroad collective bargaining agreements is that management retains and reserves all rights that it has not clearly bargained away in the agreement. Historically the common law recognized the prerogative of management to hire and fire, shift work, abolish positions, etc. as business reasons dictated. It has long been established, as Judge Murrah said in *Beeler v. Chicago R. I. & P. Ry. Co.*, 10 Cir., 169 F.2d 557, 560, (1948) certiorari denied 335 U.S. 903, 69 S.Ct. 407, 93 L.Ed. 437, of the Railway Labor Act:

> "The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process. Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginia R. Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. Cf. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352."

To the same effect see also *Thomas v. New York, Chicago & St. Louis R. Co.*, 6 Cir., 185 F.2d 614 (1950) where the Sixth Circuit affirmed a district court's denial of enforcement to an NRAB award.

Since the common-law right of management to run its business as it sees fit, to abolish jobs, and adjust its work force as it desires still prevails untrammeled so long as management has not bargained away those rights in a collective bargaining agreement, and inasmuch as nothing in the Agreement in any way impinges upon the Railway Company's managerial right to change car lines, it is manifestly clear that the decision of the Board was arbitrary, capricous and contrary to law.

Petitioners did not point out and have not pointed out any language of the Agreement which gives them rights in perpetuity to have LCL break-bulk freight work brought to them in Huntington. The obvious reason is because there is no such language in the Agreement, but rather the right to change schedules as business needs dictate is one of the rights reserved to the Railway Company because it was not bargained away in the Agreement.

Moreover, there actually was no transfer of work from Huntington to Ashland—or for that matter to Richmond or Clifton Forge, Virginia, which points also were used as break-bulk stations after the 1955 schedule change (Petition, Appendix, Section One, p. 23)—but thereafter LCL work just was no longer brought to Huntington from the originating cities affected. The schedule change told B&O, Pennsylvania, Southern, and other railroads, as well as C&O's own station agents in places like Detroit, Michigan, that thereafter they were to send package cars to Ashland, Clifton Forge and Richmond. Since those package cars after that change never came to Huntington, it cannot accurately be said that the contents of those cars were "transferred" to Ashland or Richmond, yet that was the argument of the Union which was accepted by the majority of the Board.

But even if the facts in this instance be viewed as a transfer of work from one seniority district to

another, the District Court correctly divined that such action did not violate the 1945 Agreement. The Board's interpretation of that Agreement interpolated into it a provision sometimes found in such agreements but which was significantly absent in this instance. *Westchester Lodge 2186, Brotherhood of Railway & Steamship Clerks, etc. v. Railway Express Agency, Inc.*, D.C.S.D. N.Y., 218 F.Supp. 187 (1963) modified 2 Cir., 329 F.2d 748 (1964) concerned an agreement containing the following language:

> "Positions or work involving a position may be transferred from one seniority district to another after conference and agreement between the management and the duly accredited representatives of the employes. Employes may follow their position or work when same is transferred from one seniority district to another."

Whatever effect such a paragraph might be said to have with regard to the Railway Company's actions of 1955, if it had been in the Agreement here, the Board slipped into egregious error and completely exceeded its jurisdiction when it in effect inserted such a paragraph in the 1945 Agreement. Such a paragraph might be a proper subject for the Clerks Union, as representatives of the employees, to seek to negotiate with the Railway Company for a new Agreement, but it was not a proper item for the Board to attempt to place in the 1945 contract by interpretation.

No car which was loaded and billed to Huntington was diverted to Ashland, and the Clerks Union members have worked every car that was ever sent to Huntington. The whole difference betwen the parties in this instance is the petitioners' claim that the Railway Company had to continue sending cars to Huntington, while the Railway Company says, with logic and authorities supporting it, that the Union contract of

1945 only gives the Clerks Union members the right to work whatever freight handling there was to be done in Huntington and did not obligate the Railway Company to bring work to Huntington.

It follows, then, that the lower court was correct in denying petitioners' motion for summary judgment and in granting the Railway Company's motion, since the NRAB order attempted to read something into the Agreement that was not there. It has been pointed out on several occasions in considering NRAB awards that the Board cannot write a new contract for the parties under the guise of interpreting their collective bargaining agreement. As aptly expressed in *Hunter v. Atchison, T. & S.F. Ry. Co.*, 7 Cir., 171 F.2d 594, 599 (1948), "In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract * * *" which the court stated made the Award "void because the Board exceeded its authority." See also authorities to same effect cited by the District Judge in his opinion. Petition, Appendix, Section Three, p. 13a.

Consequently, the Board acted arbitrarily and capriciously and, in the words of *Enterprise*, wrongfully and illegally dispensed its "own brand of industrial justice." The lower courts were clearly correct in granting summary judgment and refusing enforcement of the invalid award. The decision is entirely in keeping with *Gunther* and with the National Labor policy decisions recognized by this Court. Although it is plain that the federal courts are, under *Gunther* and other decisions of this Court, empowered to refuse enforcement of an award wherein the Board exceeds its authority, as is the case here, it must now be pointed out that if such is not the case, then serious constitutional objections involving denial of due process of law under the Federal Constitution are raised.

The Adjustment Board is a public agency, not a private go-between. *Washington Terminal Co. v. Boswell*, D.C. Cir., 124 Fed.2d 235, 244 (1941) affirmed 319 U.S. 732, 63 S.Ct. 1430, 87 L.Ed. 1694 (1943).

In *St. Joseph's Stockyards Co. v. U.S.*, 298 U.S. 38 at 51, 56 S.Ct. 720, 80 L.Ed. 1033 (1936), Mr. Justice Hughes delivering the opinion of the Court said:

> "* * * When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitarily * * *."

And in a concurring opinion in the same case, Mr. Justice Brandeis, 298 U.S. 38, 77 declared:

> "* * * When dealing with constitutional rights (as distinguished from privileges accorded by the Government, United States v. Babcock, 250 U.S. 328, 331) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it * * *."

Turning specifically to the Railway Labor Act, the recital in Section 3, First (m) saying that the award of the Adjustment Board is final and binding, does not preclude judicial review of the validity of the award. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 720, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945).

Courts "are invested with sufficient appellate jurisdiction over the Board to protect * * * from a denial of due process." *Ferro v. Railway Express Agency, Inc.*, 2 Cir., 296 Fed.2d 847, 852, 853 (1961) and cases cited therein. Even *Parker v. Illinois Central Railway Co.*, D.C.N.D. Ill., 108 Fed.Supp. 186 (1952) relied on by petitioners at page 9 of the Petition, held that where the award is not supported by substantial evidence, "this court would have the power to set it aside. To that extent, the award is not 'final'." It would naturally be assumed that these safeguards are inherent in the *Gunther* decision for to assume the opposite would be to say that the case was bottomed on an unconstitutional basis—an absurdity! There is clearly no conflict between *Gunther* and the instant case. Too, any conflict which may have existed between the circuits as to matters upon which *Gunther* is controlling was resolved at the time *Gunther* was decided and, as of now, there is no conflict between the circuits and no need for further clarification to be made by this Court.

Furthermore, it must be remembered that the Railway Company, while not admitting the validity of the award, paid a total of $59,104.95 to fifty-nine employees by reason of the award to achieve good labor relations. The manner of determining which employees were affected and the method of computation was discussed with the Clerk's Union and the Union found this agreeable. See uncontradicted affidavit of C. E. Weaver, Jr., Appendix, this brief, p. 10. While this action by the Company did not prejudice its rights in this case and was entirely in keeping with the principle that one can pay a judgment and still appeal therefrom [Cahill v. New York, N.H. & N.R. Co., 351 U.S. 183, 76 S.Ct. 758, 100 L.Ed. 1075 (1956)], it shows that the dispute in this case is of limited significance and has no far reaching consequence or effects on the continuing labor relations between Company and Union and the national labor peace. There

is nothing here that affects anyone except the litigants under the peculiar circumstances of this case.

II. EVEN UNDER A VALID AWARD THESE PETITIONERS ARE NOT ENTITLED TO RELIEF.

Even if the NRAB order in this case were correct and if it could be said that the Railway Company violated the 1945 Clerks Agreement when it changed car lines, the record demonstrates full handedly that these 16 petitioners still are not entitled to recover. The facts set forth in the affidavit filed in support of the Railway Company's Motion for Summary Judgment (Page 1, Appendix to this brief) which were not contradicted by any factual counteraffidavit show that none of the petitioners was adversely affected by the 1955 change. As fully described therein, the records of the Railway Company show that five of the petitioners were paid in 1960 for every hour they missed or any wage differential lost by reason of the 1955 alteration of package car schedule. One petitioner was fired for disciplinary reasons, to which he took no appeal, and eight were already "cut-off" hence they had no job to lose by the abolishment of positions. Another's job was abolished for an entirely different reason, and Hanson earned as much on other jobs for the Railway Company as he could have earned on the job that was abolished.

Clearly there was no disputed issue of material fact because Petitioners themselves also moved for summary judgment. Then, too, the District Court determined in an earlier opinion in 198 F.Supp. 325 (D.C.S.D. W. Va. 1961) that jurisdiction did not lie with the National Railroad Adjustment Board and found that there was no need for further clarification or interpretation of the award by the Board. And, of course, in any event, contrary to Petitioners' argument at page 6 of the Petition, the burden was on Petitioners to seek further interpretation. See *Koel-*

ker v. Baltimore and Ohio Railroad Company, 140 F.Supp. 887 (D.C.E.D. Penna., 1956).

There is ample authority substantiating the Railway Company's method of computing losses of the affected employees, which limited any possible recovery to the amount paid the 59 employees. In *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 10 Cir., 338 F.2d 407, 409-410 (1964) certiorari denied 33 L.W. 3347, an action involving enforcement of an NRAB award, the court elucidated:

> "We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R. R. v. Brotherhood of Ry. Clerks, 4 Cir., 210 F.2d 812, 815 * * *."

New Orleans Public Belt R. Com'n. v. Ward, 5 Cir., 195 F.2d 289 (1952) affirmed an NRAB award for time lost, "except that the amount thereof should be less any amount earned in any other employment during the time in question." Similarly in *Brimmer v. Pullman Co.*, D.C.E.D. Mo., 49 Commerce Clearing House Labor Cases, Case 18984, page 31,477 (1964) the court denied enforcement to an NRAB award but went on to say that even if there had been a violation of the agreement, inasmuch as the measure of damages in these cases "is the amount he would have earned under the contract less such sums as he in fact earned * * * plaintiff Brimmer would not be entitled to his claim for he has suffered no damages * * *."

There is no question that we are here dealing with the "money award" part of the Board's decision. Under

the decisions of this Court the "money award" is subject to hearing *de novo* by the District Court on the merits. See *Gunther*. The Court had clear authority to grant summary judgment as to what, if any, money damages were due.

Since a judgment will be upheld on appeal if sustainable on any legal basis, even though the district court reached its result by assigning some different ground, the additional factor that these 16 petitioners had no unpaid wage losses and can recover nothing even under a valid award makes it clear beyond cavil that the judgment below should be affirmed. The Fourth Circuit has said "the practice in this court of considering grounds additional to those passed upon by the court below in support of the judgment and decree is too well settled to permit of discussion." *Knotts v. First Carolinas Joint Stock Land Bank*, 4 Cir., 86 F.2d 551 (1936).

As the Court of Appeals pointed out in its opinion upon consideration of the entire record, there is no error in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,
WILLIAM C. BEATTY
AMOS A. BOLEN
Attorneys for respondent
The Chesapeake and Ohio Railway Company, a Corporation

900 First Huntington National
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Huntington, West Virginia
April 25, 1966

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APPENDIX

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MOTION FOR SUMMARY JUDGMENT

Respondent, The Chesapeake and Ohio Railway Company, a corporation, moves the Court pursuant to Rule 56, Federal Rules of Civil Procedure, to enter a summary judgment in its favor dismissing this action, on the ground that there is no genuine issue as to any material fact and Respondent is entitled to judgment as a matter of law.

This Motion is based upon:

(1) Award No. 9193 of the Third Division, National Railroad Adjustment Board, upon which this action is premised, is invalid, erroneous and unenforceable.

(2) The claims of Arthur Lee Masterson, Denver Bowman, Earl Scragg, Milford Maynard and C. B. Taylor have been fully satisfied and settled, wherefore they are barred of any recovery herein.

(3) The remaining eleven other petitioners herein were not adversely affected by displacement as a result of the reduction of work forces at the Respondent's Huntington Freight Station which was involved in setting Award No. 9193, wherefore they are not entitled to any recovery herein.

In support of this Motion the affidavit of C. E. Weaver, Jr., with exhibits thereto, is attached.

AFFIDAVIT

STATE OF WEST VIRGINIA
COUNTY OF CABELL, TO-WIT:

This day appeared before the undersigned authority C. E. Weaver, Jr., who after being duly sworn, deposes and says:

I am Assistant Vice-President—Labor Relations, of The Chesapeake and Ohio Railway Company; I make this affidavit in support of a Motion for Summary Judgment being filed by the Respondent in the case pending in the United States District Court for the Southern District of West Virginia styled Fletcher H. Hanson, et al., v. The Chesapeake and Ohio Railway Company, a corporation, Civil Action No. 1061; this action grows out of Award No. 9193 of the Third Division, National Railroad Adjustment Board; the Railway Company's participation before the N.R.A.B. in this matter was handled in my department, and I am familiar with the matters involved therein.

It has been the custom and practice through the years to adjust car lines and to change break-bulk points on less than carload package shipments at the sole discretion of railroad management and until after the consummation of the change which forms the basis for this litigation neither the railroad's employees nor the Union had claimed that such an exercise of managerial prerogative violates any portion of the company-union collective bargaining agreement, and it has become the custom and practice in the railroad industry and more particularly on the C&O that management could freely make such changes. The collective bargaining agreement allegedly applied in said Award No. 9193 had been in effect for many years without any change in any respect material to this controversy and throughout the years had always been interpreted

by the parties to said agreement as inapplicable to adjustments to car lines and changes in break-bulk points. For instance, the C&O removed such break-bulk transfer work from its Chicago, Illinois, Freight Station to Peru, Indiana, and then later to Cincinnati, Ohio, without any claim that it was impinging upon any labor rights of Chicago freight workers. On many other occasions there have been reductions or increases in freight worker forces by reason of a change in the billing of LCL way cars, but never before was a claim made by the union that such a change required negotiations.

Attached hereto and made a part hereof are:

(a) A printed copy of the record of N.R.A.B. Award No. 9193 setting forth the complete facts and positions of the company and union therein, as well as the opinion of the Board, and copies of the exhibits introduced before the Board which were not printed as a part of the record—all marked for identification here as "Weaver Exhibit A."

(b) Copy of agreement dated January 1, 1945, as supplemented, between The Chesapeake and Ohio Railway Company and all that class of clerical, office, station and store employes represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes effective January 1, 1945, No. 7, marked for identification here as "Weaver Exhibit B."

In my position I have been responsible for supervising the collation of employment records pertaining to the individual employees of the Railway Company who claim to have been affected by the matters dealt with in N.R.A.B. Award No. 9193. These records contain the following facts concerning the employees who

are petitioners in the above-mentioned Civil Action No. 1061:

When the position of Trucker C-38 was abolished on May 17, 1955, as a part of the reduction of work forces at the Railway Company's Huntington Freight Station, James H. Napier, who was the incumbent of that position, exercised his right of seniority and displaced a junior employee as Station Porter C-39; on May 23, 1955, Napier was duly dismissed from service pursuant to Board of Inquiry No. 10335. No appeal was taken by Napier from that disciplinary action, and his dismissal has become final. Napier suffered no loss of time by reason of the abolishing of the position Trucker C-38.

Harrison Bradshaw was not in active employment of the Railway Company in April-May-June, 1955, when the 23 positions complained of in Award No. 9193 were abolished at the Huntington Freight Station, Bradshaw having been displaced on November 16, 1953, from his position of Stower C-12. He was clasified as "cut off" from November 16, 1953, until September 27, 1955, at which time he exercised his seniority and accepted a vacant position; Bradshaw worked for the Railway Company thereafter when his seniority permitted until he was granted an annuity under the Railroad Retirement Act on June 3, 1960, thereby surrendering all his employment rights. Bradshaw was not ascertainably adversely affected by reason of the abolishing of positions at the Huntington Freight Station.

C. E. Cyrus held the position of Trucker C-46 from July 3, 1953 to June 17, 1955. His position was not affected by the abolishment of 23 positions involved in N.R.A.B. Award No. 9193; in point of seniority, Cyrus was senior to the incumbents of all Trucker positions which were abolished as a part of the reduction of forces by 23 men. Due to reduction in April-May, 1955 in the amount of Huntington less-than-car

load freight forwarded and received at the Huntington Freight Station, the position of Trucker C-46 was abolished June 17, 1955, and Cyrus took another position; Trucker C-46 was re-established August 8, 1955, and Cyrus took the job again; Trucker C-46 was again abolished January 4, 1956, and Cyrus took another position, continuing to work at some position with the Railway Company until January 2, 1959, when he was awarded an annuity under the Railroad Retirement Act, surrendering all employment rights with the Railway Company. The periodic abolishment of the position Trucker C-46 had nothing to do with the break-bulk or transfer shipments handled in Ashland, Kentucky, and involved in said Award No. 9193 but occurred by reason of fluctuation in the amount of freight received and forwarded for Huntington. These fluctuations occurred by reason of the amount of business carried on in Huntington and did not result from any corresponding changes at the Company's Ashland Freight Station, as may be seen from the following statistics:

Huntington, West Virginia

1955 Month	Tons Freight Forwarded	Tons Freight Received	Total
January	284	506	790
February	337	584	921
March	441	681	1122
April	460	590	1050
May	370	506	876
June	362	642	1004
July	400	650	1050
August	450	759	1209
September	431	747	1178
October	441	747	1188
November	349	704	1053
December	351	592	943

Ashland, Kentucky

1955 Month	Tons Freight Forwarded	Tons Freight Received	Total
January	134	308	442
February	107	314	421
March	131	398	529
April	124	340	464
May	207	317	524
June	165	361	526
July	166	360	526
August	191	442	633
September	181	405	586
October	211	417	628
November	184	441	625
December	153	322	475

C. E. Cyrus was not ascertainably adversely affected by the force reduction involved in N.R.A.B. Award No. 9193.

Okey O. Farley was "cut off" December 1, 1954, when displaced from the position of Trucker C-51 and remained in "cut off" status until August 21, 1959, when he resigned. Farley had no active employment with the Railway Company in 1955 when the 23 positions involved in N.R.A.B. Award No. 9193 were abolished at the Huntington Freight Station and was not ascertainably adversely affected by the matters dealt with in said Award.

Fletcher H. Hanson held the position of Check Clerk A-319 until he was displaced in April, 1955, by J. T. Frederick (who was the incumbent of Check Clerk A-170, one of the 23 positions abolished at the Huntington Freight Station, and who had more seniority than Hanson); Hanson on that date exercised his seniority to the position of Check Clerk A-146, Huntington. On April 26, 1955, Hanson was displaced from that position, and in turn he displaced another as

Swing-Clerk A-379, Huntington; May 14, 1955, Hanson was displaced from that position, and he in turn displaced another as Yard Clerk A-252, St. Albans, W. Va.; on August 29, 1955, Hanson was awarded the position of Seal and Check Clerk A-330, Huntington; from which he was displaced September 10, 1955, at which time he in turn displaced another on his old position as Yard Clerk A-252, St. Albans, W. Va. On October 10, 1955, Hanson was awarded Swing Clerk A-302, Huntington, and from that date until July 1, 1960, he held some position with the Railway Company in Huntington. All positions held by Hanson since April 19, 1955, paid an equal or higher rate than the position of Check Clerk A-319 from which he was displaced after the abolisment of 23 positions involved in N.R.A.B. Award No. 9193. Hanson suffered no loss of time nor decrease in wages by reason of the matters involved in said Award.

William H. Henderson was disqualified September 3, 1954, from Clerk A-160, office of Chief Train Dispatcher; Huntington, and was in the status of "cut off" until October 6, 1956, when he was awarded Swing Clerk A-362, Huntington; he held various positions such as Yard Clerk (teletype) A-424, Swing Ticket Seller A-293, Typist-Clerk A-228, Typist-Clerk in Personnel, Clerk-Typist in Pass Bureau, Car Movement Clerk, Machine Operator, and Wheelage Clerk in Car Records and Car Accounting, between October 6, 1955, and March 19, 1959, on which latter date he forfeited his seniority on the Huntington District Transportation Department Group 1 Roster. Henderson had no active employment with the Railway Company at the time of the abolishing of 23 positions at Huntington Freight Station and was not ascertainably adversely affected by the matters involved in N.R.A.B. Award No. 9193.

Elbert Keesee held no regular position in 1955 when 23 positions were abolished at the Railway Com-

pany's Huntington Freight Station, but was in the status of "cut off," his last position having been Trucker C-127, which was abolished November 5, 1953. On August 17, 1959, Keesee left the "cut off" status when he was awarded the position of Station Porter C-27, Charleston, and he intermittently has held a Station Porter, Charleston, position. Keesee was not ascertainably adversely affected by the matters involved in N.R.A.B. Award No. 9193.

Warren Mellert held the position of Station-Porter C-24 when that position was abolished March 18, 1954, and then held no regular position, but was classified as "cut off" until January 30, 1961, when he was awarded the position of Station Porter C-32. Mellert had no active employment with the Railway Company in 1955 when the 23 positions were abolished at the Huntington Freight Station which were involved in N.R.A.B. Award No. 9193 and Mellert was not ascertainably adversely affected by the matters dealt with in said Award.

Alderson W. Mills was displaced November 18, 1953, from the position of Station-Porter C-32 and held no regular position thereafter, being classified as "cut off" until he was granted an annuity under the Railroad Retirement Act, May 19, 1958, surrendering all employment rights with the Railway Company. Mills had no active employment with the Railway Company in 1955 when 23 positions were abolished at the Huntington Freight Station, and he was not ascertainably adversely affected by the matters involved in N.R.A.B. Award No. 9193.

Martin Prince was displaced April 4, 1954, from the position of Swing-Station-Porter C-68 and held no regular position thereafter, being classified as "cut off" up to July 1, 1960. Prince had no active employment with the Railway Company in 1955 when 23 positions were abolished at the Huntington Freight Station, and he was not ascertainably adversely af-

fected by the matters involved in N.R.A.B. Award No. 9193.

Oshel C. Scragg was classified as "cut off" from June 26, 1954, until granted a leave of absence July 25, 1955; on June 12, 1956, he was awarded the position of File Clerk A-129 and from that date until July 1, 1960, held various positions in various departments in Huntington as Time Keeper, Car Movement Clerk-Machine Operator, Mail and Ditto Machine Operator, and Key Punch Operator. Scragg had no active employment with the Railway Company in 1955 when 23 positions were abolished at the Huntington Freight Station, and he was not ascertainably adversely affected in the matters involved in N.R.A.B. Award No. 9193.

By a series of detailed memorandum agreements effective July 1, 1960, The Chesapeake and Ohio Railway Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes agreed upon job positions involved in the transfer of break-bulk work formerly billed to Huntington, West Virginia, and after June, 1955, billed to Ashland, Kentucky. These management-union agreements disposed of the situation covered by N.R.A.B. Award No. 9193 so that in reciting the above data regarding various employees we have not included any matters dating after July 1, 1960.

Although of the opinion that Award No. 9193 is erroneous and unenforceable, The Chesapeake and Ohio Railway Company by time check on the second half of August, 1960, payroll, prior to the institution of Civil Action No. 1061, as a means of seeking labor peace and in an attempt to avert litigation, paid those employees who were ascertainably adversely affected by the abolishing of 23 positions in its Huntington Freight Station in 1955. A total of 59 employees were found by careful and laborious study to have incurred losses totaling $59,104.95, and those persons

were paid that sum of money. The method of computation used was to take the 23 incumbents of the abolished positions and follow their work records to July 1, 1960, and pay them any difference from time lost or pay differential between what they actually earned and what they would have earned on the position they held prior to its abolishment. Since those 23 men "bumped" or displaced persons with junior seniority to them holding other positions, and those displaced persons in turn displaced other employees, every person who by such subsequent exercise of seniority was affected or furloughed was followed through to July 1, 1960, and paid any wage losses. This method of computation, which was felt to be a reasonable and liberal interpretation of the Adjustment Board's Award No. 9193, was discussed with the Brotherhood, and the General Chairman of that Brotherhood stated that his union would accept a settlement so made in full satisfaction of the Adjustment Board's Award No. 9193 and the Brotherhood has brought no litigation relating to that Award. The payments were made as aforesaid by the Railway Company in good faith believing then, as now, that by such payments it had fully abided by and complied with the Adjustment Board's Award. Included in the 59 employees with whom the Railway Company settled on the above-stated method of computation were:

(a) Arthur Lee Masterson, who was paid $19.70.

(b) Denver Bowman, who was paid the sum of $73.20.

(c) Earl Scragg, who was paid the sum of $539.82.

(d) Milford Maynard, who was paid the sum of $2,581.15.

(e) C. B. Taylor, who was paid the sum of $119.60.

* * * * * * * * *

END